

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 8**

CHICAGO & MIDWEST JOINT  
REGIONAL BOARD, WORKERS  
UNITED/SEIU

Petitioner

and

BORGERS OHIO, INC.

Employer

CASE NO. 08-RC-272130

**EMPLOYER BORGERS OHIO, INC.'S POST-HEARING BRIEF**

**I. INTRODUCTION**

The sole issue in this case is whether the Acting Regional Director will order a manual election and honor the request of both the Petitioner, Chicago & Midwest Regional Joint Board, Workers United/SEIU ("Petitioner") and the Employer, Borgers Ohio, Inc. ("Borgers" or "Company"), or order a mail ballot election that would contravene the parties' request and circumvent the Board's guidance and stated preference for manual election, where appropriate. The Acting Regional Director should order a manual election, or allow the parties to reach a stipulated election agreement for a manual election.

Prior to the R-hearing held February 24, 2021,<sup>1</sup> the Region repeatedly communicated to the Company that if the Covid-19 "positivity rate" in Huron County, Ohio is at or above 5%, then the Region will automatically direct a mail ballot election.<sup>2</sup> Application of the positivity rate factor

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<sup>1</sup> All dates are 2021 unless noted otherwise.

<sup>2</sup> Based on data reported at the CDC website: <https://covid.cdc.gov/covid-data-tracker/#county-view>.

as a *de facto* rule, with no consideration of other relevant factors or consideration of recent statistics in the Norwalk area regarding the severity of the Covid outbreak directly contradicts the Board's guidance in its recent seminal decision in *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 1 (Nov. 9, 2020).

In *Aspirus*, the Board emphatically stated its preference for manual elections and provided clear guidance for Regional Directors to exercise their discretion to determine if a mail ballot was appropriate under the circumstances of a particular case. The Board also directed Regional Directors to focus evaluations on recent statistics regarding the severity of the outbreak in a specific locality and counseled that the factors it prescribed for Regional Directors to consider should not be applied in a rote manner. The ARDs approach in this case violates that guidance.

In *Aspirus*, the Board reaffirmed its longstanding preference for manual ballot elections based on considerations that “remain valid today,” even with the COVID-19 pandemic. Manual elections “permit in person supervision of the election, promote employee participation, and serve as a tangible expression” of employees’ statutory rights. 370 NLRB No. 45, slip op. at 1. Without retreating from its longstanding preference, the Board identified five factors which Regional Directors, in the exercise of their *discretion*, should consider, and, if appropriate and necessary, may justify ordering a mail-ballot election for safety-related reasons. *Id.* at 4–8. In creating that exception, however, the Board expressly recognized that “[t]here are also now circumstances, however, in which manual election[s] can be safely conducted.” *Id.* at 4. This is one such case.

All five factors set forth in *Aspirus* support a manual election, to wit: (1) the Region 8 office is not in "mandatory telework" status; (2) the number of new cases in Huron County, Ohio, has decreased 86% from its peak in early December; (3) the proposed manual election site at Borgers’ Norwalk facility complies with local and state health orders; (4) Borgers has agreed to

provide all of the manual election safeguards and protocols required by Board and NLRB General Counsel guidance; and (5) Borger's has not had a COVID-19 outbreak at the facility, and Borgers will disclose and certify the status of COVID-19 cases in the facility.

In addition, since July 2020, employees have been reporting to work and working in person at the Company's manufacturing plant in Norwalk, Ohio, providing what has been essential services under Ohio's governing guidelines. Therefore, all eligible voters will continue to report to, and to work in person at, that facility regardless whether a manual election is directed.

The only aspect of the *Aspirus* guidelines yet to be determined is whether the COVID-19 testing positivity rate in Huron County will be greater than 5% when the election is directed. The Board has made clear, however, that the guidelines are not to be applied in rote fashion. The Acting Regional Director must not order a mail-ballot election based solely on a positivity rate that may be a tick above 5% for the County where an assessment alone, especially where daily cases have plummeted in Huron County and throughout Ohio over the past three months. Evaluation of recent statistics regarding the severity of the outbreak in the area, and of the other *Aspirus* factors, demonstrate the propriety of a manual election in this case.

A manual election also will provide the parties a prompt and efficient determination of the question concerning representation. A mail-ballot election, in contrast, would likely extend voting for weeks and carries inherent risk of triggering objections based on current delays and systemic problems with mail deliveries through the United States Postal Service (USPS). Currently, USPS mail is unreliable and risks suppressing eligible voters' opportunity to cast their ballots.

For these reasons, the Acting Regional Director should order a manual election, or allow the parties to execute a stipulated election agreement for a manual election.

## II. FACTS

The following background facts were submitted through the Employer's Offer of Proof at the February 24 hearing and are not disputed:

### A. Background of the Parties

Borgers manufactures automotive parts at its facility located at 400 Industrial Parkway, Norwalk, Ohio. Borgers sells its products to automotive manufacturers, such as General Motors, Mercedes Benz, Ford and other manufacturers. The Norwalk plant is a 300,000 square foot, wide open facility, with high ceilings and state of the art ventilation. Borgers employs approximately 300 employees at its Norwalk Facility, including approximately 240 hourly production and maintenance employees. (ER 1, Declaration of Gary Smith).

The Norwalk Facility's production and maintenance operations work on three shifts, five or six days per week. The normal shift times are 6:00 am – 2:00 pm; 2:00 pm – 10:00 pm; and 10:00 pm – 6:00 am. Since approximately July 2020, the Norwalk facility has maintained full production operations, *during which time all scheduled employees have been required to report and have worked their scheduled shifts in person at the Norwalk Facility.* (*Id.* ¶ 3).

On or about February 2, Borgers received a petition for Certification of Representative filed by the Chicago and Midwest Regional Joint Board, Workers United/SEIU ("Petitioner") to become the collective bargaining representative of a bargaining unit comprised of Borgers' production and maintenance employees working at the Norwalk Facility. In the petition, the Petitioner requested a manual election to be conducted at the Norwalk Facility. There currently are approximately 240 employees in the proposed bargaining unit. (ER 1 ¶ 6).<sup>3</sup>

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<sup>3</sup> The parties have agreed the following is an appropriate unit within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time production and maintenance employees employed by Borgers Ohio Inc. at its manufacturing plant located at 400 Industrial Parkway, Norwalk, Ohio, 44857, including employees in the Production, Quality, Logistics, Maintenance and Engineering departments.

## **B. Borgers' Response to the COVID-19 Pandemic**

In response to the COVID-19 pandemic, Borgers implemented and continues to maintain a COVID-19 Response Plan. Consistent with this plan, employees are required to wear masks at all times and must maintain appropriate social distancing at all times. Borgers has established stations offering hand sanitizers for employees. In addition, spraying and disinfecting occurs every Friday, with deep cleaning occurring monthly. Furthermore, Borgers has established barriers at workstations to ensure employee spacing and requires employees to have their temperature checked each day when they arrive to the facility. (ER 1, ¶ 5).

Since March 2020, Borgers has had a total of 10 employees test positive for COVID-19 at the Norwalk Facility and there have been no mass outbreaks at the facility. (ER 1, ¶ 4). That is only 10 positive cases over the course of a year among approximately 300 employees.

Consistent with Petitioner's request for a manual in-person election, Borgers has proposed that the voting take place in the “R&D Room” in the Norwalk Facility. The R&D Room is a large, open space located in the rear of the Norwalk Facility and is particularly suitable for facilitating an election. The R&D Room measures 60 feet by 84 feet, comprising over 4800 square feet and has a 24 foot high ceiling. There are two louvres in the room that can be opened for increased ventilation. The R&D Room has two doors that open directly to the outside of the building, a one-person door and a large overhead door that is approximately 16’ wide and 20’ high. Either door would allow the Board agent conducting the election to enter and exit the polling area directly from outside the building and without walking through the facility. (ER 1, ¶ 7).

In addition, Borgers expressly committed at hearing that it will fully comply with the standards and protocols set forth in General Counsel Memorandum GC 20-10 (Suggested Manual

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Excluded: All temporary/agency employees, office clerical employees, all professional employees, guards, and supervisors as defined in the National Labor Relations Act. (BD Ex. 2, ¶ 9).

Election Protocols)(July 6, 2020) ("GC Memo") in order to facilitate a manual election at the Norwalk Facility. (ER 1, ¶¶8-9). Specifically, at hearing the Company expressly agreed to provide certifications before the election that the polling area is consistently cleaned in conformity with established CDC guidelines. (Tr. 36). The Company further agreed to certify (1) how many employees tested positive for COVID-19 (or are experiencing symptoms) in the 14 days preceding the election (Tr. 37); and (2) that its representative and observer at the pre-election conference and tally of the ballots have not tested positivity (nor experienced symptoms) in the 14 days prior to the election. (Tr. 38).

### **C. The Current State of the COVID-19 Pandemic**

At the peak of the COVID-19 pandemic in Ohio, the daily case count reached 13,510 on November 30, 2020. See <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards> (visited 2/26/2021). As of March 4, the 21-day average had plummeted to 2,094 cases. The number of new daily cases in Ohio has dropped 82% in three short months.

The data in Huron County largely mirrors Ohio. Daily cases in Huron County reached its peak on December 1, 2020, with 87 cases. Currently, average daily cases in Huron County has dropped to 12, down 86% from its peak.<sup>4</sup> Due to the development and distribution of three different vaccines, the number of positive cases is likely to continue to decline in Huron County and throughout Ohio. As of March 4, nearly 7% of Huron County residents have completed the vaccine regiment and 12% have started, receiving at least one dose of vaccine. (ER 5-6).

Due to the dramatic decline in COVID-19 cases, many of the governmental restrictions in Ohio recently have been lifted. On November 19, 2020, the Director of the Ohio Department of Health issued an order requiring all Ohio residents to stay at home or their place of residence from

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<sup>4</sup> <https://www.mayoclinic.org/coronavirus-covid-19/map/ohio>

10:00 p.m. until 5:00 a.m. This Order was extended three times due to the continued prevalence of the transmission of COVID-19. The final extension of the stay at home order was issued on January 27, 2021, which expired on February 11, 2021.

On February 11, the Director issued an order relating to the reopening of restaurants, and did not include or extend the stay at home order, effectively lifting the curfew that had been in place for the previous three months. That Order also completely lifted the restrictions prohibiting the service of alcohol after 10 p.m. Bars and restaurants are now fully open across the state. Further, students in Norwalk schools are now back to full time, and youth and high school sports are going forward. People are going to the gym, contact sports are being played across the state, and movie theaters are open. (ER 2, p. 2).

#### **D. Problems with Delayed Mail Continue for the United States Postal Service**

Over the last six month, media reports of problems and delays with USPS mail have flooded the airwaves. Data from USPS illustrates just how bad the problem has grown. (ER 7). The most recent report of Quarterly Performance for Single-Piece First-Class Mail reveals that national on-time delivery of two-day first class mail fell from 91.9% reported in the first quarter of 2020 (October through December) to 81.5% for the same period reported in 2021. For three-to-five-day first class mail, on-time delivery fell from 78.2% to 54.6%. In the Midwest Region (including Northeast and Northwest Ohio), on-time delivery was just 83.8% for two-day mail and only **58.2%** for three-to-five-day mail. (ER 7). For historical perspective, both two-day and three-to-five-day mail were on time well over 90% from 2009 through 2013. Unlike past years, USPS has not even established service targets for 2021. (ER 7, p. 2).

The problems and delays of USPS inevitably carried into problems with mail-ballot elections conducted by the NLRB. For example, in *Curaleaf Massachusetts, Inc.* (01-RC-259277), the Regional Director of Region 1 ordered a mail ballot election over the employer's objection.

Ballots were mailed on May 25 and counted on June 26. Of the 23 eligible voters, only 11 ballots were returned, and only 7 ballots were opened. There were at least four voters who reported that they cast votes that were not received by the Regional Office. The election was decided by three (3) votes, meaning the voices of 16 of the 23 eligible voters were silenced. The employer filed Objections and Offers of Proof on July 6, which remain pending. (ER 8).

Similarly, in *St. Luke's Hospital*, (01-RD-267972), the Regional Director for Region 1 directed a decertification election via mail ballots under a stipulated election agreement. Although the parties attempted to establish safeguards to help ensure eligible voters had an opportunity to vote, they failed. The Notice of Election posted at the employer's facility included phone numbers for the Regional Office and the NLRB, telling employees to call the number if they did not receive a ballot by November 25, 2020. The ballots were mailed on November 18 and the deadline to return the ballots was December 9. However, when employees did not receive ballots and called the phone numbers, they got a message "we could not complete the call." The employer informed the Regional Office that eligible voters did not receive ballots and were unable to reach the Region or the NLRB, but the problems were not resolved and voters did not receive ballots with enough time to vote. Ultimately, the ballots that were received were counted on December 15, 2020. Out of 760 eligible voters, only 590 cast ballots, and the election was decided by just five votes. At least six eligible voters – a determinative number – reported to the employer that they did not receive a ballot with sufficient time to vote. The employer filed Objections and Offers of Proof on December 22, 2020, which remain pending. (ER 9).<sup>5</sup>

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<sup>5</sup> Similarly, in *Solstice Sleep Products* (09-RC-270027), the Regional Director ordered a mail-ballot election for a unit of 85 employees. Ballots were mailed on January 15, 2021. By February 9, the Region reported that only 17 ballots had been received, approximately 18% of the unit. Employees reported that they were unable to reach a live person from the Board or the Regional Office. At least one employee reported that he did not receive a ballot, despite requesting replacements after the original ballot never arrived. (ER 3, p. 4-5).



### III. DISCUSSION

#### A. The Compelling Reasons to Order a Manual Election Outweigh the Substantially Mitigated Risks

The Board reaffirmed in *Aspirus* its long held preference for manual elections and that such elections are the rule and not the exception even during the pandemic. The Board further emphasized that the standards and protocols set forth in GC Memo 20-10 “are designed to ensure manual elections can be conducted safely and efficiently . . . .” 370 NLRB No. 45, slip op. at 7. Indeed, the Board plainly stated its preference for manual ballot elections based on considerations that “remain valid today,” even with the pandemic. The Board’s purpose in *Aspirus* was “to set forth the guidelines and parameters applicable to determining the propriety of a mail-ballot election under the current [pandemic] circumstances.” *Aspirus*, 370 NLRB No. 45, slip op. at 1. The Acting Regional Director’s position to automatically order a mail ballot election if the 14-day positive test rate for Huron County is above 5% directly contravenes the Board’s guidance in *Aspirus*. The Board clearly stated that mail ballots are the exception and not the rule, and that the relevant factors it prescribed for Regional Directors to consider should not be applied in a rote manner.

The relative positivity rate is not a *de facto* rule. As the Board in *Aspirus* made clear, this condition is a guideline, **not a mandate** for a mail ballot election: “[i]n sum we find that if any of the five specific situations set forth above, or other similarly compelling considerations are present, Regional Directors should **consider** [not require] directing a mail ballot election. **To be sure, Regional Directors must continue to use their discretion in this areas; the foregoing situations do not require a mail-ballot election.**” *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 8 (emphasis supplied).

The purpose of *Aspirus*’ “Condition 2” is simply to assess “the severity of the outbreak in the specific locality where the election will be conducted.” *Aspirus* at 5. Although the Board

identified two categories of statistics – the 14-day trend and the positivity rate – as relevant to assessing the severity of the outbreak, it notably conceded that both categories only “suggest” unacceptable local rates. *Id.* The data in Huron County and statewide suggests the opposite – namely that the outbreak is on a steep decline.

Evaluation of all relevant factors make clear that the 5% positivity rate should **not** be applied as a *de facto* test to direct a mail-ballot election in this case:

- Average daily cases in Huron County are down 86%, from 87 cases on December 1, 2020, to a current average of 12 cases per day.
- Average daily cases in Ohio are down 82%, from 13,510 on November 30, 2020, to a current average of 2,094 cases.
- The development and current distribution of three different vaccines is a relevant and material criterion that was not a reality when *Aspirus* was decided. As of March 4, nearly 7% of Huron County residents have completed the vaccine regiment and 12% have started, receiving at least one dose of vaccine. (ER 5-6). Notably, vaccinations are given to those most vulnerable to COVID-19, thereby protecting those who need it the most.
- The 7-day positivity rate across Ohio has dropped to 3.3%. See <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/key-metrics/testing>.
- The 21 day trend of total reported case average has dropped significantly statewide from 5,859 on January 21, 2021 to 2,094 on March 3, 2021. See <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/current-trends>.
- The test positivity rate in Huron County has dropped from a high of almost 30% in January to approximately 7% and continues to decline.
- The state’s hospitalizations for COVID-19 are and have remained under 2,500.
- Borgers is a single facility where every employee within the petitioned-for unit physically works on a daily basis. The vast majority of employees who work at Borgers live within the Norwalk area or within a commuting distance. There is no logistical reason which would warrant or support a mail ballot election in this instance.
- Restrictions are being revamped and eased across the state in light of the positive COVID trends. For instance, on February 11, 2021, the Governor of Ohio

completely lifted the overnight curfew as well as the restrictions prohibiting the service of alcohol after 10 p.m. Bars and restaurants are now fully open across the state. Students in Norwalk schools are now back to full time and youth and high school sports are going forward. People are going to the gym, contact sports are being played across the state, and movie theaters are open. Average daily cases continue to decline.

Moreover, as the Board in *Aspirus* makes clear, the test rate needs to be measured “from the date of the Regional Director’s determination, or as close to the date will allow.” *Aspirus Keweenaw* at 5, n. 20. Here, no determination has yet been made by the Acting Regional Director – and given the rapid rate at which positivity rates are dropping, the numbers will likely be at or very near 5% by the time of the election – a date which has yet to be set.

Further, the relative positivity rate is actually ill-suited for assessing the actual “severity of the outbreak” and should not be used to make policy decisions. As the Johns Hopkins Coronavirus Resource Center points out:<sup>6</sup>

It is important to note that test positivity is a measure of testing capacity and while it can provide important context about case totals and trends, it is NOT a measure of how prevalent the virus is in communities. **Policy decisions, like openings and closings or interstate travel, should not be determined based on test positivity alone.**

See <https://coronavirus.jhu.edu/testing/differences-in-positivity-rates>. Here, the Region is attempting to do precisely what science is cautioning against – making a decision based purely upon test positivity alone (and in spite of the overwhelming data that things are improving).

Furthermore, the Board decided the *Aspirus* case in November 2020 – at the height of predictions that the pandemic would be at its worst in the wake of Thanksgiving and the holiday season. Since that time, real world developments have drastically altered the pandemic – such as vaccine distribution and drastic case reductions, and scientifically supported protocols to provide a safe polling place for voters, Board agents, and observers.

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<sup>6</sup>This is the website the Board refers to in support of GC 21-01.

Contrasting this case with the Board's recent decision in *Amazon.com Services LLC* (10-RC-269250)(Feb. 5, 2021) further illustrates the propriety of a manual election. The instant circumstances are easily distinguishable and nowhere near as dire as in *Amazon*. In *Amazon*, the proposed unit included over 5800 employees, 40 of whom had tested positive for COVID-19 in the two-weeks preceding the Regional Director's decision. The applicable facility was experiencing a COVID-19 outbreak. With 5800 employees in the proposed unit, the Regional Director held it was inevitable employees would congregate while waiting to vote. Unlike here, the union in *Amazon* had petitioned for a mail ballot election. Also, the positivity rate in Jefferson County, Alabama (the facility's location) was over 17%. When the Regional Director issued her decision on January 15, 2021, the pandemic was much more prevalent than it is today, and it had been getting worse throughout the state of Alabama. In stark contrast, the average daily cases in Ohio and Huron County have dramatically decreased since peaking in late November.

The Acting Regional Director must not use positivity rate as the sole disqualifying factor for a manual election. The totality of the circumstances demonstrate such an election is warranted.

**B. The Stated Preference of Borgers and the Petitioner for a Manual Election Should be Given Substantial Weight**

The Petitioner specifically requested a manual election in the RC petition. During the February 24 hearing, Petitioner and Borgers reiterated their preference for a manual election. And near the close of the hearing, both parties stated their willingness to sign a stipulated election agreement for a manual election (proposed for March 12, 2021). Although such date may no longer be feasible, Borgers remains committed to conducting a safe and prompt manual election in accordance with the Board's decision in *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 1 (Nov. 9, 2020), and the protocols set forth in GC Memo 20-10.

The parties' collective request and preference for a manual election should be given substantial weight in evaluating the type of election directed. Accordingly, the Acting Regional Director should defer to the wishes of the parties who will actually be impacted by the outcome of the election and direct a manual election.

**C. Mail Ballot Elections Result in Decreased Voter Participation which is Exacerbated by USPS Delays and Problems**

The Region's inclination to conduct a mail ballot election will also severely undermine the Act's goal of maximizing voter participation in an election. *See In re Baker Victory Servs., Inc.*, 331 NLRB 1068, 1070 (2000) (referencing "the Board's goal of ensuring maximum voter participation"); *Versail Mfg., Inc.*, 212 NLRB 592, 593 (1974) (noting that elections are to be scheduled "at times and places, including whatever special provisions appear to be appropriate, that will best [e]nsure maximum participation in light of what is known at the time the procedures are set up"); See also Memorandum GC 20-07, Guidance Memorandum on Representation Case Procedure Changes, at 6 n.10 (June 1, 2020) ("Elections scheduled pursuant to election agreements will continue to be scheduled for the earliest date practicable following the approval of the agreement, taking into account employee participation. Thus, the dates selected for the election should be those that enhance the opportunity for employees to vote.").

The Board recognized in *Aspirus* that manual elections are vastly superior to mail-ballot elections in this regard. Manual elections, among other things, "promote greater participation in the election process" and "serve as a tangible expression of the statutory right of employees to select representatives of their own choosing for the purpose of collective bargaining, or to refrain from doing so." *Aspirus*, 370 NLRB No. 45, slip op. at 1–2. After surveying more than 1,000 Board-conducted elections since October 1, 2019, the Board concluded that voter participation rates in mail-ballot elections were, on average, 20% to 30% lower than in manual elections:

Internal Board statistics reflect that from October 1, 2019 through March 14, 2020, the Board conducted 508 manual elections, in which 85.2 percent of eligible voters cast a ballot; during that same period, the Board conducted 48 mail-ballot elections in which only 55.0 percent of eligible voters cast a ballot. Similarly, from March 15 through September 30, the Board conducted 46 manual elections in which voter turnout was 92.1 percent and 432 mail-ballot elections in which turnout was 72.4 percent. *Id.* at 2. As the Board observed, while “the mail-ballot participation rate has increased during the [COVID]-19 pandemic . . . [it] continues to lag significantly behind the manual election participation rate (30% lower before March 15, 20% lower since).” *Id.*

Issues with voter turnout in mail-ballot elections are well established, and previous elections have had such low turnout that federal courts and the Board have had to overturn them. See, e.g., *Shepard Convention Servs., Inc. v. NLRB*, 85 F.3d 671, 675 (D.C. Cir. 1996) (“[T]he Board’s reversal of the Regional Director’s discretionary decision to conduct a manual election cannot be upheld. Had the Board left the decision intact . . . voter turnout might well have been higher. . . . It could hardly have been lower.”); see *id.* at 673 (noting that only 77 out of 438 eligible employees – or 17.5% – cast ballots during two-week mail-ballot election); See also *Int’l Total Servs.*, 272 NLRB 201, 201 (1984) (setting aside mail-ballot election where only 19% of eligible voters returned their ballots and 23% of eligible voters never received their ballots and urging the Regional Director and the parties “to work together to explore alternative election procedures in order to ensure that all eligible voters have an opportunity to vote and to maximize the probability of a representative vote”).

Mail-ballot elections almost always take longer to conduct than manual elections. That risk is especially pronounced in this case, where the Board will have to manage the process of mailing approximately 240 ballots, with the necessary follow-up work associated with re-mailing to new

addresses and providing duplicate or replacement ballots. Moreover, in contrast to mail-ballot elections, where the voting period alone extends over several weeks, a manual election here can take place on a single day. See NLRB Casehandling Manual, Part 2, Representation Proceedings (Sept. 2020) § 11336.2(d) (deadline for returning mail ballots should usually be two weeks from the date of mailing to the date of return); *id.* § 11302.1 (manual elections should be scheduled “on the earliest date practicable” and “may stretch over several days, where necessary”); see also Eli Rosenberg, *The Latest Frontier in Worker Activism: Zoom Union Meetings*, Washington Post (Sept. 11, 2020) (counting mail ballots added three weeks to election process for unit of only 89 employees).

Mail-ballot elections, by design, increase the potential for post-election disputes and conflict with the Board’s goals of accuracy and efficiency. See Representation – Case Procedures, Final Rule, 84 Fed. Reg. 69,524, 69,529 & n.20 (Dec. 18, 2019) (stating that “certainty and finality must wait until the conclusion of post-election litigation” and the “pendency” of election disputes that “could linger on after the election for weeks, months, or even years before being resolved” is “a barrier to reaching certainty and finality of election results”); *A.J. Tower*, 329 U.S. at 332 (affirming election policy adopted by the Board because the policy gave “a desirable and necessary finality to elections”);

In addition, mail-ballot elections increase the risk of delay due to elevated and prolonged opportunities for coercion and other interference with the voting process. The lack of direct Board supervision over the mail-ballot voting process increases opportunities for improper coercion and interference. See *Mission Indus.*, 283 NLRB 1027, 1027 (1987) (“[M]ail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual elections, due to the absence of direct Board supervision over the employees’ voting.” (citing *Brink’s Armored Car*, 278 NLRB

141, 141 (1986)); *Thompson Roofing, Inc.*, 291 NLRB 743, 743 n.1 (1988) (same); *Wilson & Co., Inc.*, 37 NLRB 944, 944 (1941) (mail balloting “has frequently raised material and substantial issues relating to the conduct of the ballot and the election”); see also *NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794, 797–98 (3d Cir. 1999) (discussing absentee mail-ballot procedures in NLRB elections and noting that they “would add an additional layer of bureaucracy and complexity which, if not handled properly, could compromise the fair election process”). In sum, the NLRB mail ballot procedures lack many of the safeguards that state elections have.

Mail ballots may be – and frequently are – lost or delayed, causing a prolonged election process. The USPS has experienced significant delays throughout the pandemic. Not long ago, USPS regularly delivered first class mail on time over 90% of the time. The USPS's most recent quarterly report revealed that only 54.6% of three-to-five-day first class mail is delivered on time! These problems have occurred in numerous NLRB election matters already. In both *Curaleaf Massachusetts* and *St. Luke's Hospital*, a determinative number of ballots were either lost or sufficiently delayed to make it impossible for eligible voters to cast their ballots. Both cases resulted in protracted litigation over the elections, undermining the very concept of a fair election. See ER Ex. 8-9.

Borgers' Norwalk facility is an ideal location for a manual election. The Norwalk Facility is a large (300,000 square foot), wide open facility, with high ceilings and state of the art ventilation. Moreover, safety is paramount at Borgers. Since the COVID-19 outbreak in March, 2020, the Company has taken great steps to ensure the continued safety of its employees. Indeed, the Company implemented a COVID-19 Response Plan whose guidelines and practices the Company adheres to even to this day. Consistent with this plan, employees are required to wear masks at all times and must maintain appropriate social distancing at all times. The Company has



established stations offering hand sanitizers for employees. In addition, spraying and disinfecting occurs every Friday, with deep cleaning occurring monthly. Furthermore, the Company established barriers at workstations to ensure employee spacing. No doubt as a result of these efforts, and despite the fact that Borgers employees work closely with one another on a day-to-day basis, the Company has only had a total of 10 employees test positive for COVID-19 since March 2020. And, not surprisingly, there have been no mass outbreaks at the facility.

In sum, Borgers requests the Region consider the actual wishes of both the Petitioner and the Company, and direct a manual election.<sup>7</sup>

#### **IV. CONCLUSION**

Accordingly, and for all the above reasons, the Acting Regional Director should respect the wishes of the parties and order a manual election.

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<sup>7</sup> For all of the stated reasons, Borgers remains adamant that a manual election is the only appropriate type of election in this case, as such an election provides the most fair and efficient methodology for an election and provides eligible voters the best opportunity to cast their ballots. However, if the Acting Regional Director decides to order a mail-ballot election, the Company respectfully requests that the Order include the following safeguards:

- a. The Notice of Election to be posted in the Norwalk Facility should include a direct telephone number and direct email address for the Region 8 official handling the election;
- b. A system for the Region to track the status of ballot packs that are mailed. Specifically, this would include use of USPS Express Mail or UPS or FedEx deliveries, so that envelopes can be tracked. This would be at the government's expense.
- c. The Region should reasonably hold open the date to count the ballots, so that it can be extended if voters need to request replacement ballots; and
- d. A provision that any ballots received in the Region 8 office prior to the vote count will be counted.

By proposing these alternative safeguards, Borgers does not waive its primary argument and position that consideration of all of the *Aspirus* factors and the other facts and circumstances discussed above warrant that the Acting Regional Director should order a manual election in this case.

Respectfully submitted,

/s/ Stephen J. Sferra

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ATTORNEYS FOR THE EMPLOYER

Borgers Ohio LLC

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of March, 2021, a copy of the foregoing was served via e-mail upon:

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